87-639

No.

Supreme Court, U.S.
FILED
SEP 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987, 1988

PERATI, PAUL F.

Petitioner & Plaintiff,

vs.

BUELL, JOS., et al.,

Appellees & Defendants.

On Writ of Certiorari to the Court
of Appeal of the State of California,
First Appellate District
Division Two

JURISDICTIONAL STATEMENT

and

An amendment to the Notice of Appeal

Paul F. Perati
6666 Oakwood Dr.
Oakland, Calif. 94611
In Propria Persona
(415) 339-2817

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

I

Does depriving a state employee of: A pretermination hearing, prior to her separation from state service in the course of her defense of this appellant in a Personnel Board pension grievance, with a surprise job termination on the day she was giving birth to a daughter, violate Due Process?

Then a postdeprivation Kangaroo hearing, by presentation of testimony known to be perjured by Appellees, with an Impostor on the stand to make a record, appear to this Court to be sadistic, cruel, ruthless, outrageous, and going beyond all bounds of decency?

Coupled with attempted instigation of criminal activity under color of state law, including a

promise to bash appellant's head in for objecting to an attempt to create false evidence coupled with knowledge by appellant's co-state workers that appellant was subjected to investigatory and surveillance by appellees, resulting in a chill to the near freezing point of Appellant's First Amendment Rights of Association. Should this be "SHOCKING to the CONSCIENCE" of any Court, resulting in a violation of substantive Due Process under Rochin v. California 342 US 165?

IA

Upon proof of the above, will the doctrine of Johnson v. Glick 481 Fed.2d 1028, 2nd cir. p. 1032 ft. Nt., allowing a 42 USC 1983 action in Conscience Shocking actions be permissible?

-B-

II

Once the court acquires jurisdiction by valid service of summons on a defendant, does a short delay (apparently a mixup in filing by a doe third party) in filing the Proof of said service, strip the court of its acquired jurisdiction over a defendant in a Civil Rights action with an overriding federal interest?

III

May a trial court dismiss a public interest action being litigated by a layman in Propria Persona, at the start of the pleading stage, for failure to proceed with diligence, when reasons are stated why plaintiff must proceed with caution, no jurisdictional rules or statutes having been violated, both being in favor of trial on the merits, resulting in a discretionary state rule of

procedure defeating a federal right?

IV

Are the allegations in I above within the landmark case of Ex parte Young 209 US 123, 159-160 (1907) in the sense that state supervisors who intentionally are in violation of the Federal Constitution are stripped of any official or representative character, thus subject to the consequence of their tortious conduct?

OTHER PARTIES

Ft. nt.: Other Defendants below and Appellees are: Toll Service Chief Sal Priolo, Toll Capt. John Sant, Toll Capt. William Sam, Toll Lt. Frank Rodgers, and Toll Collector Andrew Ligons.

No.

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1987, 1988

PERATI, PAUL F.

Petitioner and Plaintiff,

vs.

BUELL, JOSEPH, et al.,

Appellees and Defendants.

On Writ of Certiorari to the Court of Appeal of the State of California

First Appellate District

Division Two

JURISDICTIONAL STATEMENT

and

An Amendment to the Notice of Appeal

Paul F. Perati
6666 Oakwood Drive
Oakland, CA 94611

In Propria Persona

415-339-2817

SUBJECT INDEX

	Page
Questions Presented	A,B,C,D,
Other Parties	D
Opinions Below PAGE 1.	APPENDIX
Dismissal of Buell from First Amended Complaint	1
Dismissal of Priolo, Sant, Sam, Rodgers, Ligon, from Second Amended Complaint	3
Three Years Back Pay for Gardner (First two par. Ques. Presented)	5
Supreme Court Denial of Hearing	7
District Court of Appeal Opinion	11
Notice of Appeal to U.S. Supreme Court	8
Exhaustion of State Remedies	
Jurisdiction	2
Nature of the Case	3
Reasons for Granting and Conclusion	15
Proof of Service	Back Cover
Authorities	Appendix page 27

PERSUASIVE AUTHORITIES

SUPREME COURT RULES, TEXTS,

CONGRESSIONAL MANDATES, STATE STATUTES

	Page
ALL WRITES ACT	35
CONGRESSIONAL MANDATE	27
SUPREME COURT RULE 17b and c	28
CALIF. GOV. CODE §58081	27
50 CAL.JURIS.3rd	28
WITKIN CALIF. PROC. 3rd, ACTIONS	28
STATE CASES	
KAISER FOUNDATION HOSPITAL v. SUPERIOR COURT 49 Cal.App.3d 523	
WILLENS v. BOGGS 21 Cal.App.3d 520	29
DENHAM v. SUPERIOR COURT 2 Cal.3d 557	30
MARTINDALE v. SUPERIOR COURT 22 Cal.3d 568	30
LEHTO v. UNDERGROUND CONSTR. CO. 69 Cal.App.3d 933, 943 (6)	29

FEDERAL RULES AND CASES

	Page
RULE 17b, RULES of the SUPREME COURT	28
EX PARTE YOUNG 209 US 123, 159-160	32
JOHNSON v. GLICK 481 Fed.2d 1028, 1032 (4)	31
BUSH v. LUCAS 462 US 367, 373	31
CLEVELAND BD. OF EDUCATION v. LOUDERMILL 470 US 532, 542	31
CHRISTIANBURG GARMENT CO. v. EEOC 434 US 422	32
GOSS v. LOPEZ 419 US 572	32
HAGUE v. C.I.O. 307 US 496	32
HAINES v. KERNER 404 US 519	33
JONES v. RATH PACKING CO. 430 US 519	33
LAWRENCE COUNTY v. LEAD-DEADWOOD SCH. DIST. 106 Sup.Ct.Rept. 695, 698, 1985	34
LOGAN v. ZIMMERMAN BRUSH CO. 435 US 422, 428	33

Page

MARBURY v. MADISON 5 US 137 34

MAREK v. CHESNY 473 US 1 27

RAY v. ATLANTIC PACKING CO. 34
430 US 519

REYNOLDS TOBACCO v. DURHAM 34
107 Supr.Ct. 499-507

ROCHIN v. CALIFORNIA 342 US 165 34

SUPER TIRE ENGINEERING CO. v. 31
McCORKLE 550 Fed.2d 903, 907

SILKWOOD v. KERR-McGEE CORP.
464 US 238, 248

FEDERAL STATUTE

The inherent power of this Court is codified in the All Writ Act. 28 USC 1651a.

OPINIONS BELOW

November 5, 1986, the State of California awarded appellant's defender Bev Gardner (questions presented first two par.) over three years back pay--appendix page.

The denial without opinion of appellant's Petition for Hearing by the Calif. Supreme Court on July 1, 1987, exhausted any state remedies and appears on page appendix.

The unpublished opinion of the Calif. District Court of Appeals appears on page appendix.

The Order of Dismissal of Appellees Priolo, Sant, Sam, Rodgers, and Ligons of Appellant's Second Amended Complaint appears on page appendix.

The Order of Dismissal of defendant Buell of the First Amended Complaint appears on page appendix.

Notice of Appeal to this Court appears on page appendix.

JURISDICTION

The Notice of Appeal was properly filed in the California District Court of Appeal on August 3, 1987.

This Court has jurisdiction over this Jurisdictional Statement for a Certiorari under the All Writs Act 28 USC 1651a, Rule 17b Rules of this Court, Art. 3, the First, Fourth, Fifth, and Fourteenth Constitutional Amendments.

Also Congressional Mandates S.Rep. 94-1011, at 2, 4 and 5; House R. #94-1558 at 6. And Rochin v. California 342 US 165; Marek v. Chesney 473 US 1, 31, n.44; Haines v. Kerner 404 US 519, 520; Haque v. Committee for Industrial Organization 307 US 496; Christianburg Garment Co.

v. Equal Employment Opportunity Commission 434 US 412, 422.

NATURE OF THE CASE

This is an appeal from the District Court of Appeals judgment sustaining the trial court's order dismissing one defendant in the pleading stage in a civil rights action, as PROOF of the court having obtained jurisdiction over a defendant was misplaced or misfiled (a ministerial act--no question as to defendant being properly and timely served) for a short period of time. Also having the second amended complaint dismissed for lack of diligence in prosecution (not on the merits), although appellant gave reasons why he, a lay propria persona litigant, had to proceed with caution, no jurisdictional issue was present or

at issue, mere discretion which was abused.

Additionally, a substantive due process count (raised in the District Court of Appeal, valid under Cal. Gov. Code 68081) of "Shocking the Conscience of the Court" (although the factual allegations were covered in the trial court), which was denied by not deciding this federal question, overlooking the fact civil rights cases serve a public interest that is broader than the individuals and Congressional policy gives the highest priority to Civil Rights Causes.

A retaliatory discharge on the day Appellant's defender was giving birth, without a hearing, then over a three-year wait before reinstatement with full back pay, coupled with Kangaroo proceedings covered in "Questions Presented," having knowledge

of Appellees' practice of denying procedure due process, without the Court having its Conscience Shocked, carries with it the distinct risk that other lower echelon state employees will be scared to protect their rights or provide testimony so they won't get thrown out on the street for three years like Mother and Child in the present case.

Appellees have shown they are devoid of compassion, and are within Rochin v. California 342 US 165. Appellant should be allowed to offer proof as in Haines v. Kerner 404 US 519, 520.

From Marbury v. Madison 5 US (Cranch) 137, 162-163 through Bush v. Lucas 462 US 367, 373, this Court has kept the Constitution dynamic by insuring the just and rational development of the common law.

This is a golden opportunity for another clarifying step to allow lower echelon state employees to know that they, too, are protected by the federal Constitution's due process, and that Congressional Civil Rights Mandates are a reality.

A discretionary state rule of practice with no valid support in the record, legal or factual, should not be used to defeat a federal right protected by the Constitution.

Its employment here in dismissing Appellant's second amended complaint resulted in the defeat of the nationwide overriding federal interest expressed in Rochin v. California 342 US 165, and its application is in conflict with Rochin.

Defendant below and appellee Lt. Buell was dismissed from the first amended complaint, but not the

second.

Buell was served the Second Amended Complaint (but returned it), the Notice of Appeal to the State Appellate Courts and this Court, but chose not to join in responding with his co-respondents.

At the trial court pleading stage, Buell stated he NEVER had been served with summons, nor had any PROOF of SERVICE been returned to the court as to him, within three years as required by statute.

Buell was properly served by the same Attorneys Messenger Service as his co-defendants, and on the same day.

When the Proof of Service on Buell (affidavit of service) surfaced, Buell dropped his contention that he never had been served, and merely contended, the PROOF had not been

returned to the court within three years (a ministerial filing requirement).

The cause of the delay in the ministerial filing, or misfiling, of the proof is not known, only that Buell's co-defendants were properly served, as was Buell on the same day (at their work), the ministerial filing of proof (that the court had obtained jurisdiction over them) was properly made as to them, but Buell's was misfiled--or what--for a short period of time.

Both the Calif. rule--Lehto v. Underground Constr. Co. 6 Cal.App.3d 933, 943 (6) and this Court's rule in Jones v. Rath Packing Co. 430 US 519, and Ray v. Atlantic Richfield Co. 435 US 151, 158, hold that a state law that stands as an obstacle to the objects of Congress is void.

Thus Buell has been and is within the jurisdiction of the courts since the day he was properly served with summons.

The basic rule, that not to decide, is to decide, applies to Buell in the "Shocking the Court's Conscience Count" as does Ex Parte Young. Super Tire Engineering Co. v. McCorkle 550 Fed.2d 903, 907 (4).

The majority California rule is that an insufficient or irregular return (proof) does not impair the court's jurisdiction.

Actual service, not the proof of service, is what confers jurisdiction on the court. Willen v. Boggs 21 Cal.App.3d 520, 524, in accord Kaiser Foundation Hospital v. Superior Court (1975) 49 Cal.App.3d 523.

Hence the District Court of

Appeal decided this jurisdiction question in a way in conflict with other state courts and should be reversed in line with Rule 17b of this Court. Witkin Calif. Procedure 3rd, Actions Vol. page 820, 50 Cal.Juris.3d page 705G.

Thus, holding that the alleged irregular return stripped the trial court of its acquired jurisdiction over Buell in the First Amended Complaint, resulting in the dismissal of Buell, stands as an obstacle to objects of Congress to promote the vigorous enforcement of Civil Rights, Christianburg Garment Co. v. EEOC 434 US 422, Marek v. Chesny 473 US 1, 31-32, and is therefore void in its application, Ray v. Atlantic Richfield Co. 435 US 151, 158.

Appellant has a property right in his Civil Rights Actions of which

he is being deprived without due process, Goss v. Lopez 419 US 572.

The dismissal of Buell in the First Amended Complaint should be reversed.

SECOND AMENDED COMPLAINT

The allegations in "Questions Presented" showing this Appellant's Civil Rights violations by appellees on pages A and B C & D are incorporated herein and realleged.

The trial court had discretion to dismiss an action for want of prosecution if not brought to trial when no reason appears.

Appellant alleged reasons why he had to act with caution--that the mortality rate was high--that Toll Lt. Miller, Capt. Schmmel, Capt. Del Giorgio were pleased that the judicial branch was finding out what

was going on, they were laid to rest--fine funerals, the state lost dedicated employees--but they were talking when they should have been listening, that the trial judge, Hon. Orla St. Claire, who tried two Mandamus actions that appellant won against a State Agency, was laid to rest, clerk's tran. p. 85, that appellant's defender Bev Gardner was terminated on the day she was giving birth to a daughter--a surprise shower??? or a rain storm? Thus appellant did state some, but not all, the reasons why he had to proceed with caution.

In Denham v. Superior Court 2 Cal.3d 557 and Martindale v. Superior Court 2 Cal.3d 568, it was held that the policy of the discretionary dismissal statute were less powerful than that which seeks to

dispose of litigation on the merits.

Thus dismissing this Civil Rights action is in conflict with strong Calif. Supreme Court decisions, and flies in the face of Rule 17b of this Court.

Again we have a discretionary procedural statute standing as an obstacle to the objects of Congress which calls for the vigorous enforcement of Civil Rights.

A state court may not follow its rules of procedure when those rules make a federal right meaningless. Lehto v. Underground Constr. Co. 69 Cal.App.3d 933, 943 (6), Silkwood v. Kerr-McGee Corp. 464 US 328, 348, Reynolds Tobacco v. Durham County 107 Sup.Ct. 499-507.

These causes of action being property rights based on substantial Constitutional issues, should not be

dismissed without a hearing on the merits, Logan v. Zimerman Brush Co. 455 US 422. Both the trial court and the 9th C.A. overlooked federal questions in a way that conflicts with the decisions of this Court as well as the Calif. Supreme Court in dismissing the Second Amended Complaint, thus violating Rule 17b of this Court.

These Appellees in their own proper persons deprived this Appellant his defender and others of liberty and property without due process as frowned on by Cleveland Board of Education v. Loudermill 470 US 532, 543, with courses of conduct that should shock the conscience of courts nationwide.

Under Ex Parte Young, when state employees are in violation of the Federal Constitution, they are

stripped of their official or representative character and are subjected to the consequences of their tortious conduct. The State has no power to give them immunity for illegal conduct under color of law. Further guidance on the scope and application of Ex Parte Young 209 US 123 will assist state courts nationwide on this Constitutional question of continuing importance.

CONCLUSION

It is requested that Jurisdiction or at least probable Jurisdiction be noted, and a brief be allowed to be filed for a Writ if needed.

The overriding federal interests at stake concern:

The deprivation of procedural and substantive due process under color of state law, a Kangaroo Court

with all the trimmings. The fleshing out of the scope and application of Rochin v. California, as applied to civil actions, as well as updating Ex Parte Young.

A denial of certiorari will deny state courts guidelines on the application of Young and Rochin, and if granted when viewed from a national level will save state courts from running into rocks and shoals, thus promoting judicial economy at the state level. A granting of the writ will also send signals that Kangaroo courts are frowned on as they damage the civil service system, the law as an institution as well as the community at large.

Respectfully,

Paul F. Perati

Paul F. Perati
In Propria Persona

F I L E D
JAN 10 1985
RENE C. DAVIDSON, County Clerk
By_____
Delane Williams, Deputy

ROBERT J. DeFEA
KENNETH G. NELLIS
Attorneys for Defendant
Joseph Buell

595 Market Street, Suite 1700
Mail: P. O. Box 7444
San Francisco, CA 94120-7444
(415) 982-3130

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

PAUL F. PERATI, Plaintiff, v. JOSEPH BUELL, et al., Defendants.	NO. 551,907-9 ORDER OF DISMISSAL

The motion of defendant JOSEPH BUELL for an order of dismissal came on regularly for hearing on January 7, 1985. Appearing as attorneys were Kenneth G.

Nellis for defendant JOSEPH BUELL and Paul F. Perati in pro per. Satisfactory proof having been made and good cause appearing,

IT IS ORDERED that this action is dismissed as to the defendant JOSEPH BUELL.

DATED: JAN 10 1985

/s/ Winton McKibben
Judge

APPENDIX 2

ENDORSED
F I L E D

APR 23 1985

RENE C. DAVIDSON, County Clerk
By_____, Deputy
Delane Williams

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

PAUL F. PERATI,	NO. 551,907-9
Plaintiff,	ORDER OF DISMISSAL
v.	
JOSEPH BUELL, et al.,	
Defendants.	

The motion of defendants SAL PRIOLO, JOHN SANT, WILLIAM SAM, FRANK RODGERS, and ANDREW LIGONS for an order of dismissal under CCP § 583(a) came on regularly for hearing on April 18, 1985. Kenneth G. Nellis appeared for the defendants and there was no appearance by plaintiff. Per. mt. See appendix page 35 P.H.

PL. did appear.

APPENDIX 3

Satisfactory proof having been made and the court having considered the matters set forth in Rule 373 of the California Rules of Court, and good cause appearing,

IT IS ORDERED that this action is dismissed as to said defendants and that they are awarded attorneys' fees in the amount of $3,000.00 pursuant to CCP § 1021.7.

DATED: APR 23 1985

WINTON McKIBBEN
JUDGE OF THE
SUPERIOR COURT

CALIFORNIA STATE PERSONNEL BOARD

WHEREAS, in Case No. 14403, the appeal of Beverly Gardner from termination under Rule 448 from the position of Toll Collector with the Department of Transportation, there has been filed with the State Personnel Board a written stipulation and agreement which provides in pertinent part as follows:

"1. Appellant Beverly Gardner is entitled to reinstatement with full back pay, interest and benefits in accordance with Government Code section 19584 for the period May 8, 1982 through October 20, 1985; and

"2. The Department is entitled to deduct $1,544.00 from the award back pay pursuant to Government Code section 19584.";

IT IS RESOLVED that the terms of said stipulation and agreement are approved and shall be final and binding upon the parties and that the proceedings in Case No. 14403 are hereby terminated.

* * * * *

I hereby certify that the foregoing is a true copy of the resolution in Case No. 14403 adopted by the State Personnel Board on November 5, 1986.

On 8-21-, 1987
I certify that this copy is a true and correct copy of the original thereof.

/s/ Frances Mills
Appeals Asst.
SPB

/s/ Gloria Harmon
GLORIA HARMON
Gloria Harmon,
Executive Officer,
State Personnel
Board.

APPENDIX 6

SUPREME COURT
F I L E D
JUL - 1 1987
Laurence P. Gill, Clerk
Deputy

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 2, No. A032363
S000957

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

I N B A N K

PERATI

v.

BUELL et al.

Petition for review DENIED.

LUCAS
Chief Justice

APPENDIX 7

Civil AO 32363

Paul F. Perati
6666 Oakwood Dr.
Oakland, Calif. 94611
339-2817

In Propria Persona

IN THE COURT OF APPEAL

OF THE

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

PERATI, PAUL F.,	) Ala. Co.
	) 551, 907-[illegible]
Plaintiff and Appellant,	)
	) D.C.A.
vs.	) AO 32363
	)
BUELL, JOSEPH, et al.,	) S 000957
	)
Defendants & Respondents.	)
	)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Paul F. Perati, the appellant above named, hereby appeals to the Supreme Court of

the United States from the final judgment of the Court of Appeal filed April 13th, 1987 (Review Denied by the California State Supreme Court, July 1st, 1987).

This appeal is taken pursuant to 28 U.S.C. sec. 1257 (3), and the Supreme Courts inherent Legal and Equitable Pendent Jurisdiction.

Dated:July 31st, 1987 /s/ Paul F. Perati
Paul F. Perati
In Pro Per.

Copy of the within notice of appeal to the U.S. Supreme Court received this 31st day of July, 1987, for the Alameda County Court Clerk.

by (org. signed)
For the Superior
Court Appeals Dept..

APPENDIX 9

Copy of the within notice of appeal received this 3rd day of August, 1987, for the Office of Kenneth G. Nellis, Esquire, Attorney for Defendants and Respondents.

by

(orq. signed)

APPENDIX 10

F I L E D
APR 13 1987
Court of Appeal - First Dist.
By RON D. BARROW, Clerk
DEPUTY

COPY

**NOT TO BE PUBLISHED
IN OFFICIAL REPORTS**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

PAUL F. PERATI,

Plaintiff and Appellant,

v.

JOSEPH BUELL, et al.,

Defendants and Respondents.

A032363

(Super. Ct. No. 551907-9 Alameda County)

Paul F. Perati, in propria persona, appeals from a judgment of dismissal of his action against several individual employees of the State of California for delay in prosecuting his action. We affirm.

On November 4, 1981, Perati filed a complaint against respondents, Andrew Ligons, Sal Priola, Frank Rodgers, William Sam and John Sant, as well as ten other defendants. The five respondents to this appeal were all fellow employees or supervisors of Perati, a toll taker on the Bay Bridge. The complaint purported to set forth various causes of action for intentional torts. Apparently no summons was issued on this complaint.

Nearly three years later, on October 24, 1984, Perati filed a first amended complaint. A copy of a summons and this complaint were served upon each of the five respondents herein on October 26, 1984.

On November 27, 1984, defendant Joseph Buell, who has not appeared as a party in this appeal, filed a motion to

dismiss the action as to him for failure to serve and return a summons within three years of the filing of the complaint, as required by former Code of Civil Procedure section 581a.1/ On January 10, 1985, the trial court entered an order granting this motion and dismissing the action as to Buell.

On November 29, 1984, the five respondents herein demurred to the first amended complaint on the grounds that the six counts alleged therein failed to plead facts sufficient to state a cause of action, that each of the six counts was barred by Perati's failure to comply with the claims statute set forth in Government Code section 950.2, and that each of the six counts was uncertain, ambiguous and unintelligible. On January 7, 1985, the trial court sustained the demurrer as to the first three counts

of the amended complaint with 20 days leave to amend and sustained the demurrer as to the last three counts without leave to amend.

On January 28, 1985, Perati filed a second amended complaint, alleging only two counts, one for slander per se and one for invasion of privacy.

On February 21, 1985, the five respondents herein filed a motion to dismiss the action pursuant to former section 583, subdivision (a), for failure to bring the action to trial within two years after it was commenced and requested an award of attorney's fees pursuant to section 1021.7. On April 23, 1985, the trial court entered an order dismissing the action as to respondents and awarding them attorney's fees in the amount of $3,000. A notice of appeal was filed on June 17, 1985.

I. The Dismissal as to Respondents

Former section 583, subdivision (a), provided in relevant part: "The court, in its discretion, on motion of a party or on its own motion, may dismiss an action for want of prosecution . . . if it is not brought to trial within two years after it is filed."2/ Pursuant to current section 583.160, a motion for dismissal for delay in prosecution made pursuant to notice given before, on, or within one year after January 1, 1985, is governed by the applicable law in effect immediately before that date. Consequently, respondent's motion to dismiss in this case is governed by former section 583, subdivision (a).

When the trial court has ruled on such a motion, a reviewing court will not substitute its opinion for that of the trial court unless a clear abuse of

discretion has been shown and there has been a miscarriage of justice. (Blank v. Kirwan (1985) 39 Cal.3d 311, 331.) "The burden is on the party complaining to establish an abuse of discretion. . . ." (Ibid., citing Denham v. Superior Court (1970) 2 Cal.3d 557, 566.)

This action was filed on November 4, 1981. When respondents filed their motion to dismiss for lack of prosecution on February 21, 1985, the action was more than three years and three months old, and Perati had done virtually nothing to prosecute this action against respondents other than to serve them with copies of the summons and amended complaint and to file a second amended complaint. Perati has articulated no coherent reason for his delay. In his brief he merely states that the trial court did not sufficiently weigh

the allegations of his complaint, which he contends are sufficient to "shock the conscience of the court," and asserts that he had to "move slowly" because "the mortality rate has been very high." We find this incomprehensible. Under the circumstances presented, the trial court did not abuse its discretion in granting respondents' motion to dismiss.

II. The Dismissal as to Buell

Perati contends that the trial court erred in dismissing the action as to Buell on the grounds that the summons on the complaint had not been served upon Buell and returned within three years of the commencement of the action, as required by former section 581a. Respondents contend that the propriety of this dismissal is not before us because it was a separate appealable judgment and no appeal therefrom was

taken. The record, however, does not reveal that any notice of entry of judgment with respect to this dismissal was mailed by the clerk or served by any party upon Perati. Consequently, pursuant to rule 2(a) of the California Rules of Court, the June 17, 1985, notice of appeal was timely as to this dismissal since it was filed within 180 days after the entry of the dismissal on January 10, 1985. We conclude, however, that the dismissal was proper.

Although Buell was served within the three-year period (on October 26, 1984), return on the summons had not been made when the three-year period expired on November 4, 1984. "Section 581a, subdivision (a) requires a trial court to dismiss an action 'unless the summons on the complaint is served and return made within three years

after the commencement of the action.'" (Johnson & Johnson v. Superior Court (1985) 38 Cal.3d 243, 247, fn. omitted, italics added.)[3/] Since return was not made within three years of the commencement of Perati's action, the dismissal as to Buell was proper.

III. The Demurrer to the First Amended Complaint

Perati complains of various rulings on the respondents' demurrer to the first amended complaint in the court's order of January 7, 1985. Since we have determined that the action was shortly thereafter properly dismissed as to respondents for failure to prosecute, we need not address these issues.

IV. The Award of Attorney's Fees

Code of Civil Procedure section 1021.7 was enacted in 1981 and provides: "In any action for damages arising out

of the performance of a peace officer's duties, brought against a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, or against a public entity employing a peace officer or in an action for libel or slander brought pursuant to Section 45 or 46 of the Civil Code, the court may, in its discretion, award reasonable attorney's fees to the defendant or defendants as part of the costs, upon a finding by the court that the action was not filed or maintained in good faith and with reasonable cause."

Respondents requested attorney's fees in their motion to dismiss both on the basis that the action was for slander and on the basis that respondents (other than Andrew Ligons) are peace officers under Vehicle Code section 23252. The

trial court awarded fees in the amount of $3,000.

Perati does not attack the implicit finding that the action was not filed or maintained in good faith and with reasonable cause. Rather, he asserts that he did not have proper notice of the hearing on the motion which included the fee request, that respondents are not peace officers and that the trial court was required to, but did not, recite in detail the circumstances justifying the fee award.

The court's tentative ruling was that the motion to dismiss would be granted. Resepondent's counsel appeared at a hearing on April 18, 1985, stated that he felt the tentative ruling was correct and additionally asked the court to award attorney's fees as had been requested in the motion to dismiss.

It appears that Perati was not notified that respondent's counsel was going to appear for the hearing. Without citation of any authority, Perati contends that under the local rules he was entitled to telephone notice that counsel intended to appear. It appears, and respondents do not dispute, that no such notice was given.

Current rule 1008 b. of the Alameda County Superior Court Local Rules requires that if only one side appears at a hearing after a tentative ruling, counsel must submit a declaration or orally state that all parties have been notified of the intended appearance. This rule became effective November 1, 1986. Assuming that there was a similar notice requirement in 1985 when the motion here was heard, we deem any failure of counsel for respondents to notify Perati of his

intended appearance harmless error. Perati had written notice of the motion which included the fee request, and filed written opposition which, inter alia, addressed the fee request. We are not persuaded that a different result would have been probable in the absence of such error. (See Code Civ. Proc., § 475.)

Perati has ignored the fact that this action was, in part, for slander. The first count of the second amended complaint, entitled "Slander per se," was premised upon an alleged statement by respondent Rogers to Perati as follows: "You blew it, why don't you admit it."

Vehicle Code section 23252 provides that the "chief of toll services, captains, lieutenants, and sergeants employed by the Department of Transportation shall have the powers and authority of peace

officers" while employed on a vehicular crossing. The record shows that respondent Priolo was chief of toll services, respondent Sant a toll captain, respondent Sam a toll lieutenant and respondent Rogers a toll sergeant. We are satisfied that these respondents were peace officers for purposes of section 1021.7.

Unlike the express requirement in section 128.5 permitting the award of expenses incurred as a result of actions or tactics that are frivolous or solely intended to cause delay), section 1021.7 does not require that an order awarding attorney's fees thereunder recite in detail the circumstances justifying the order. We conclude that the trial court did not abuse its discretion in awarding $3,000 in attorney's fees, pursuant to section 1021.7, under the circumstances of this case.

V. Respondents' Request for Sanctions

The respondents have requested in their brief that this court impose sanctions for the taking of a frivolous appeal. We have considered this request and, in the exercise of our discretion, decline to make an award of sanctions. (See In re Marriage of Flaherty (1982) 31 Cal.3d 637.)

The judgment is affirmed.

Smith, J.

We concur:

Rouse, Acting P.J.

Benson, J.

Perati v. Buell et al.
A032363

1/ All further statutory references are to the Code of Civil Procedure unless otherwise stated.

2/ Former section 583, subdivision (a), was repealed in 1984. (Stats. 1984, ch. 1705, § 4.) Similar provisions are not set forth in current section 583.420, subdivision (a).

3/ Section 581a was repealed in 1984, effective January 1, 1985. (Stats. 1984, ch. 1705, § 3.) The requirement for service of summons within three years is continued in current section 583.210, subdivision (a). However, an additional 60 days is allowed for return of summons under subdivision (b) of that section. In an action such as this one, commenced before January 1, 1985, the new provisions do not apply to a motion for dismissal made pursuant to notice given before January 1, 1986. (See current § 583.160, subd. (a); Johnson & Johnson v. Superior Court, supra, 38 Cal.3d 243, 247, fn. 2.) Accordingly, Buell's motion is governed by former section 581a.

PERSUASIVE AUTHORITIES

CONGRESSIONAL DIRECTIVES

STATUTES, RULES, TEXTS

S.Rep. 94-1011 at 245

H.R. 94-1558-6

Cited by Justice Brennan in his dissent, Marek v. Chesney 473 US 1, 32, f.n. 44, 45.

Before the Supreme Court, a court of appeal, or the appellate dept. of a superior court renders a decision in a proceeding other than a summary denial of a petition for extraordinary writ based upon an issue which was not proposed or briefed by any part to the proceedings, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford such an opportunity

a rehearing shall be ordered upon timely petition of any party. This section to remain in effect only until January 1, 1990. Calif. Gov. Code §68081.

The return of service might be formal or informal, perfect or imperfect, still if service were in fact made, the court acquired jurisdiction of the person of the defendant--cases cited. Witkin Calif. Procedure 3rd, Actions Vol. page 806, sec. 820.

An insufficient or irregular return does not vitiate jurisdiction acquired by service, since actual service rather than proof of service is what confers jurisdiction on the court. 50 Cal.Juris.3d page 705(G).

Rule 17b and c (b) When a state court of last resort has decided a federal question in a way in conflict

with the decision of another state court of last resort or of a federal court of appeals. (C) When a state court, or a federal court of appeals has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. U.S. Supreme Court Rule 17.

STATE CASES

Where proper service was made a defect in a Certification of that service did not impair the court's jurisdiction, cases cited--Willen v. Boggs 21 Cal.App.3d 520, 524.

It has been held that in enforcing a federally created right through the application of federal substantive law, the state court may follow

its own rules of procedure unless those rules so subvert the federal right as to make it meaningless, cases cited. A state rule of practice or procedure may not be employed with the substantive effect of defeating a federal right--cases cited, Lehto v. Underground Constr. Co. 69 Cal.App.3d 933, 943 (6).

The policy underlying the dismissal statute which seeks to prevent unreasonable delays in litigation is less powerful than that which seeks to dispose of litigation on the merits rather than on procedural grounds. Denham v. Superior Court 2 Cal.3d 557, 566. In accord Martindale v. Superior Court 2 Cal.3d 568, 574 (2).

FEDERAL CASES

Not to decide is to decide--

cases cited. Federal rights are denied as well by the refusal of the state court to decide the question as by an erroneous decision--cases cited, Super Tire Engineering Co. v. McCorkle 55 Fed.2d 903, 907(4).

Such a violation of constitutional rights as suffered by Rochin is sufficient to sustain an action under the Civil Rights Act. Johnson v. Glick 481 Fed.2d 1028, 1032 (4).

It is the province of the judiciary to address a remedy over cases it has jurisdiction. Bush v. Lucas 462 US 367, 373.

The root requirement of the Due Process Clause is that an individual be given an opportunity for a hearing before he is deprived of any significant property interest--cases cited, Cleveland Bd. of Education v. Loudermill 470 US 532, 542.

If the officer is in violation of the Constitution he is stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. Ex Parte Young 209 US 123, 159-160.

The efforts of Congress are to promote the vigorous enforcement of civil rights. Christianburg Garment Co. v. EEOC 434 US 412, 422.

The Due Process Clause forbids arbitrary deprivations of liberty. Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, the minimal requirement of Due Process must be satisfied. Goss v. Lopez 419 US 565, 572-575.

Important constitutional question may be raised by certiorari. Every question arising under the

constitution may, if properly raised in a state court, come ultimately to this court for decision. Hague v. C.I.O. 307 US 507.

A pro se complaint by petitioner should be entitled to offer proof. Haines v. Kerner 404 US 519, 521.

When a state law as it is applied stands as an obstacle to the objectives of Congress, it is a task for the Supreme Court. Jones v. Rath Packing Co. 430 US 519, 526.

The Fifth Amendment's Due Process imposes a constitutional limitation on the power of courts, even in aid of their own valid processes without affording a party an opportunity for a hearing on the merits of his cause. A cause of action is a species of property. Logan v. Zimmerman Brush Co. 455 US 422, 428.

A State statute may be invalid if it conflicts with federal law or stands as an obstacle to the full purposes and objectives of Congress. Lawrence County v. Lead-Deadwood Sch. Dist. 105 Sup.Ct.R. 695, 698.

When there is a legal right, there is also a legal remedy. Marbury v. Madison 5 US 137, 162.

A state statute is void where it stands as an obstacle to the objects of Congress. Ray v. Atlantic Richfield Co. 435 US 151, 158 (1978).

Rochin stands for the proposition that official (under color of state law) conduct that "Shocks the Conscience" force that is brutal and offensive to human dignity offends the Due Process Clause. Rochin v. California 342 US 165, 172.

Pre-emption may also be found where state statutes impede the

purposes and objects of Congress.*

The inherent power of this court was codified by the U.S. Congress in the ALL WRITS ACT * 28 USC 1651a.

* R.J. REYNOLDS TOBACCO CO. VS. DURHAM COUNTY, N.C.

Clarification of the Second Amended Complaint Dismissal:

The Order prepared by Appellees shows "NO APPEARANCE BY PLAINTIFF."

The clerk's transcript shows a responsive pleading by plaintiff.

The tentative ruling allowed no attorney fees. The rule not to decide is to decide, establishes no attorney fee award by the trial court.

Later, without notice to plaintiff, Appellees did slip back into court, without plaintiff being present, or having been given notice, asked for and was given a sanction award. This judicial admission is documented in the Clerk's Transcript.

DECLARATION of SERVICE

Service of the within brief received this day of Sept. , 1987, (org. signed & dated).

Clerk of the Court, Appeals Dept., Alameda County Superior Court, Court House, Oakland, Calif. Two Copies

by _____

C ourt of Appeal, First Appellate District, Division Two, 455 Golden Gate Ave,, Rm. 4156, San Francisco, Calif. 94102

by _____

For the office of,
Kenneth G. Nellis, Esquire
595 Market St., Suite 1700, 3 copies
San Francisco, Calf., 941120

by _____

The Notice of Appeal is amended to include Supreme Court Rule 17 b & c, 28 USC 1651 a .